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IN THE

Supreme Court of the United States

October Term 1992

DETROIT AUTO DEALERS ASSOCIATION, INC., *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The petitioners (''the Dealers'') hereby jointly reply to the Brief for the Federal Trade Commission in Opposition to the Dealers' petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The FTC Interpretation of the Non-Statutory Labor Exemption Discriminates Against Non-Union Employees and Their Employers and Precludes Any Resolution of the Labor Dispute

The Federal Trade Commission argues that this Court should deny the petition for writ of certiorari because under existing law a Dealer agreement without collective bargaining to reduce hours uniformly is not exempt from the antitrust laws pursuant to the nonstatutory labor exemption. There are

two flaws in the Federal Trade Commission's analysis of the exemption: (1) the FTC would allow union members to achieve goals that it would prohibit to non-union employees, even though the labor policy of the United States equally protects the rights of both union and non-union employees, and (2) the FTC would deprive the parties to the labor dispute at issue of any lawful means to resolve it.

1. The FTC does not deny that the employees could have achieved uniform hours reductions through collective bargaining with a multi-employer bargaining unit to which all Dealers were parties. That is what happened in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea,* 381 U.S. 676 (1965). The FTC contends that the absence of collective bargaining is a decisive distinction with Jewel Tea. FTC Br. at 11. If so, then non-union employees are denied the same right as union employees to obtain uniform improved wages, hours and working conditions.

This distinction between the wages, hours and working conditions available to union and non-union employees violates the basic policy of the labor laws, which guarantees to all employees the freedom to choose to be unionized or not, as they see fit. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 40 (1954); *NLRB v. Columbia University,* 541 F.2d 922, 931 (2d Cir. 1976).

The FTC argues that collective bargaining is the cornerstone of the labor laws, and concludes that because the labor laws favor unionization only union-related activities should be exempt. But that analysis is 45 years out of date. Ever since the Labor Management Relations Act of 1947, 61 Stat. 136, the law has neither encouraged nor discouraged employees from joining unions, and has assured that the same rights are enjoyed by all employees, whether or not they are unionized. Collective bargaining is now favored only to the extent that

it is a route to labor peace, which is the overriding goal of the labor laws. National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice ... of collective bargaining and by protecting the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"); *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1963) ("One of the primary purposes of the [labor laws] is to promote the peaceful settlement of industrial disputes.")

The FTC implies that non-union employees can obtain hours reductions if there are "negotiations" other than collective bargaining.[1] FTC Br. at 15. But this is directly contradicted by the decision of the Sixth Circuit, which explicitly limited the exemption to unionized employees: Dealers are entitled to the exemption if there is "bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force. . . ." 23a. [emphasis in original] The FTC's position is also contrary to its refusal to exempt Tennyson Chevrolet, despite uncontradicted testimony that in 1960 Harry Tennyson negotiated reduced hours with his non-union sales employees. IDF 298-99 at 177a.

2. The FTC would leave only two avenues for resolution of the labor dispute: individual employer reductions in hours or joint reductions in the context of formal collective bargaining as a multi-employer bargaining unit. Both avenues are illusory.

[1]The FTC asserts that the finding that there were no negotiations is "factbound." FTC Br. at 15. On the contrary, the facts are undisputed. The issue is a question of law and policy — was the unchallenged history of employee demands, pressure and intimidation, resulting in employer concessions the functional equivalent of arm's length negotiations? Dealer Br. at 14-15.

The employees' demand was not a bargaining chip or passing whim. It was a long-term, passionately sought goal from at least as early as 1954 until the close of the record in 1987. Dealers Br. at 2-5. The dispute would not, and did not, end until the employees achieved their demand.

The very nature of the demand precluded resolution through concessions by individual Dealers. The employees demanded not just that hours be shortened, but that all Dealers shorten their hours uniformly. Dealers Br. at 2-4. The dual nature of the demand, which was uncontested in the record, is glossed over in the FTC brief, but it is critical. A demand for shorter hours can be met by an individual employer. A demand for uniform hours necessarily requires coordinated employer action.

Since the employers could resolve the dispute only by granting what was demanded, and what was demanded was uniformity, the assertion that the Dealers could have defused the dispute by reducing hours individually is illusory. In fact, the FTC conceded that Dealers tried to resolve the dispute through individual concessions, and failed. 60a.

The necessary coordinated employer action could not be undertaken in the context of formal multi-employer bargaining because the unions failed to organize all of the Dealers. On the whole, the employees chose not to be unionized, as they are entitled to choose (29 U.S.C. § 157); and the employers preferred not to have their employees join a union, which is a position the labor laws entitle them to take. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). Although the unions never achieved recognition on a city-wide basis, the employees always demanded that all Dealers uniformly reduce hours -- not just the unionized employers.

Since it is unlawful for employers to collectively bargain with a purported representative of employees who choose not to unionize, *International Ladies Garment Workers Union v. NLRB*, 374 F.2d 295 (D.C.Cir. 1967) (employer cannot bargain with a union representative of employees who have not chosen to be unionized even to redress an unfair labor practice), the contention that the labor dispute could have been resolved through multi-employer collective bargaining is contrary to the labor laws.

Thus, if the antitrust laws prohibit uniform hours reductions in the absence of multi-employer collective bargaining, the employees and employers are condemned to perpetual warfare over an unresolvable labor dispute. Alternatively, the employees are forced by the FTC to join a union against their desires in order to preserve uniform shorter hours won through non-union protected concerted activity for their mutual aid and protection.

II. Non-Economic Injury, Consisting of Consumer Inconvenience, Is Not Antitrust Injury.

The FTC asserts that, in the absence of an increase in prices, a practice which makes shopping more burdensome is "no less real or harmful to consumers than higher prices." FTC Br. at 17. On the contrary, it is because inconvenience is less real or less harmful than increased prices that there was no antitrust injury in this case.[2]

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[2]The Federal Trade Commission Act authorizes the FTC to undertake two missions, protecting the market from unfair methods of competition and protecting consumers from unfair or deceptive acts. 15 U.S.C. § 45. The FTC has conceded that its consumer protection mission does not include protecting consumers from subjective injury like inconvenience. Only monetary injury or injury to health and safety is sufficiently harmful to consumers to be contrary to the FTC Act. *In the Matter of International Harvestor Co.*, 104 F.T.C. 949, 1061 (D1984). See also *Statement of Policy*

The antitrust laws are not intended to address all the potential social consequences of joint activity of competitors. They have a specific purpose, that being to prevent certain types of economic injury. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 and n.14 (1972). The FTC seeks to prohibit on antitrust grounds activities that at most cause subjective inconvenience to some consumers,[3] a result contrary to the purposes of the antitrust laws. Dealer Br. at 17.

III. The FTC's Defense of the Order Confuses the Victims With the Perpetrators of the Violence

The FTC argues that accepting the Dealers' argument that it is an abuse of discretion to compel them to non-uniformly lengthen their hours in the face of violence and intimidation would "invite investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint." FTC Br. at 21, quoting 98a. This might be an appropriate response *if* the Dealers were the instigators of the violence. But those are not the circumstances of this case.

The FTC's allegation that the Dealers were the perpetrators of the violence was abandoned because there was no evidence linking Dealers with the violence. 50a n.1. The evidence was undisputed that the Dealers were the victims of the violence.

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on the Scope of Consumer Unfairness Jurisdiction, December 17, 1980, reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment, 1969-83 ¶ 50,421 at 55, 948 ("Emotional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair.") If inconvenience is not sufficient injury to allow FTC action under its consumer protection mission, it is hard to justify FTC antitrust action predicated on such subjective harm.

[3]As previously noted, the inconvenience, if any, was minor. Dealer Br. at 22-23.

The perpetrators of the violence were not the investigative targets of the FTC, they were the employees and their unions.[4]

Under these circumstances, it was an abuse of discretion for the FTC not to give due consideration to the safety of the Dealers' lives and property, and to weigh the credible threat of serious violence against the minimal benefit the order would achieve. Such consideration would not encourage future investigative targets to use force, because a target using force would be a completely different circumstance than a target victimized by force.

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[4]This points out another reason why the FTC's limitation of the scope of the exemption is in error. The perpetrators of the violence were exempt. Only the victims, responding to demands of exempt employees, are subjected by the FTC to the antitrust laws and a remedy that exposes them to renewed violence. The situation in Detroit would be far more appropriately addressed by the labor law or the police. The FTC, which can identify no public injury other than hypothetical inconvenience, should not be permitted to disrupt an accommodation worked out by labor and management over the last thirty-eight years.

CONCLUSION

For the reasons set forth herein and in the Dealers' Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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